

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD ADAME,

No. C 09-00129 SI

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AS TO RICHARD ADAME**

v.

BANK OF AMERICA, NATIONAL
ASSOCIATION,

Defendant.

On July 30, 2010, the Court held a hearing on defendant's motion for summary judgment as to plaintiff Richard Adame. For the reasons set forth below, the motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiff Richard Adame is a fifty-eight-year old Mexican-American male. He is fluent in both Spanish and English, and prior to his demotion by defendant and subsequent resignation, had worked in the mortgage banking industry for over twenty years. Adame Decl. ¶¶ 2, 7. Adame began his career in 1986 as a wholesale banking executive for Unified Mortgage. *Id.* ¶ 9. In 1996, he was hired as a sales manager by then-Regional Executive Charles Putris to work in defendant Bank of America's (the "Bank's") Pleasanton sales office. Between 1996 and 2000, plaintiff increased the staff of defendant's Pleasanton office from five mortgage loan officers ("MLOs") to fifteen, and increased the office's annual loan volume from \$60 million to \$300 million. Adame Decl. ¶ 13. As a result, plaintiff was promoted, received numerous awards, and his compensation increased, including a \$128,000 bonus in 1999 for his outstanding performance. *Id.* ¶¶ 13-22.

1 As Sales Manager, Adame supervised a team of MLOs who dealt directly with consumers.
2 Thompson Decl. ¶ 3. Individual offices were grouped into geographical regions, which were led by
3 “regional executives.” *Id.* In the Northern California Region, in which Adame worked, the regional
4 manager was assisted in overseeing regional affairs by Regional Coordinator Nancy Chambard. Sales
5 managers were expected to meet certain monthly goals set by the Bank’s National Team at the
6 beginning of each year. Thompson Decl. ¶ 10. In 2007, these goals included the attainment of a
7 specified second mortgage/home equity line of credit (“HELOC”) volume; the sale of Buyers’ Protection
8 Plans (“BPPs”) with at least 17 percent of eligible loans; the recruitment of top-performing MLOs from
9 other financial firms; and a specified MLO productivity. Thompson Decl. ¶¶ 15-17. The HELOC goal
10 was based upon the number of a sales manager’s MLOs who produced at least two HELOC applications
11 per month, *id.* ¶ 15, and MLO productivity measured the percentage of a sales manager’s MLOs who
12 met their monthly goals. Thompson Dep.¹ at 82:13-90, 91:11-92:5. Bank of America expected sales
13 managers to ensure that their MLOs were meeting their individual monthly goals for collecting loan
14 applications. Thompson Decl. ¶ 10.

15 In 1997, Bank of America began its association with ACORN, a loan program for low-income
16 borrowers that the Bank sought to market especially to low-income minority communities. Adame
17 Decl. ¶ 27. ACORN loans were less profitable than other loans because they had less restrictive
18 qualification criteria and were partially subsidized by the Bank. Thompson Decl. ¶ 19. In addition,
19 ACORN loans were not eligible for BPPs or HELOCs. *Id.* Adame was recruited by another bank in
20 2000, but was asked to return to Bank of America by Charles Putris, the Regional Executive of the
21 Northern California Region, in 2002 to run the Bank’s San Jose office. At the time, the Bank was
22 interested in increasing its sales of ACORN loans and believed Adame would be especially effective
23 in marketing these loans to the largely Hispanic East San Jose population on account of both his cultural
24 ties to the local community and his fluency in Spanish. Adame Decl. ¶¶ 24-53. Adame successfully

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26 ¹ All depositions cited hereinafter are attached in relevant part as exhibits to either the
27 Declaration of Randall Strauss in Opposition to Defendant's Motion for Summary Judgment (Docket
28 No. 80), or the Declaration of Lena Ryan in Support of Defendant's Motion for Summary Judgment,
(Docket No. 67).

1 expanded the ACORN sales volume, and both the Bank and Putris were pleased with his performance.
2 *Id.*; Putris Dep. at 53:23-64:13.

3 In early 2007, however, the Bank began to change the criteria for ACORN loans and stressed
4 the need for sales managers to sell a greater variety of bank products. Thompson Decl. ¶ 20. During
5 the same period in early 2007, Ann Thompson, a fifty-year old Caucasian female, began working in the
6 Northern California Region as one of the Bank's "builder representatives." Adame claims that from this
7 period onward, Thompson exhibited racial and age-based animus towards him. Adame claims that he
8 learned through sales manager Bill Quinn that shortly after Thompson began working in the Northern
9 California Region, Thompson made negative comments about plaintiff's communication and managerial
10 abilities, even though she had never met him in person. Adame Decl. ¶¶ 55-59. In an effort to resolve
11 any concerns Thompson might have with his performance, Adame invited her to give a presentation to
12 the San Jose sales office, hoping that he might have a discussion with her afterwards. Adame Decl.
13 ¶ 59. Adame claims that after her March 2007 presentation, Thompson treated him and his staff rudely,
14 and allegedly contrary to custom, left abruptly without fielding any questions. Adame Decl. ¶¶ 59-62.

15 In March 2007, Putris advised Adame for the first time that the Bank wanted the region to reduce
16 its dependence on ACORN loans and focus its efforts on the sale of higher-end loans instead. Adame
17 Decl. ¶¶ 63-69. In May 2007, Thompson was made the Northern California Regional Executive. *Id.*
18 ¶ 70. Adame claims that upon arriving at the meeting in which Thompson was formally introduced to
19 the Northern California sales managers, he noticed a group of sales managers crowded around
20 Thompson; she was "talking to them in an animated fashion and was freely embracing, hugging, and
21 kissing each person on the right and left cheek." *Id.* ¶ 71. Adame claims that as he approached her,
22 expecting to receive the same treatment, he instead received what did not even amount to a full
23 handshake. *Id.* ¶ 72. Adame states, moreover, that he was struck by the "look of disgust" on
24 Thompson's face as she grasped his hand. *Id.* ¶ 74. During the meeting, he claims that Thompson
25 avoided eye-contact with him and declined to acknowledge him and allow him to contribute to the
26 meeting each time he raised his hand. *Id.* ¶¶ 77-78. Adame also testifies that during one of the breaks,
27 he spoke to plaintiff C. George Bender, an African American sales manager, about this incident and
28

1 discovered that Bender had experienced similar treatment.² *See id.* ¶ 75; Bender Decl. ¶25-29. Both
2 Bender and Adame claim that they were treated differently than non-minority sales managers on account
3 of their race.

4 In May 2007, Thompson gave plaintiff guidance on how to diversify his office's loan portfolio
5 and reduce its dependence on the issuance of ACORN loans. Adame Dep. at 245:1-15; Ryan Decl.
6 ¶ 10, Ex. I. Thompson also encouraged plaintiff to build more business alliances with real estate firms,
7 which would create more opportunities to sell non-ACORN loans. Adame Dep. 245:1-251:3; Ryan
8 Decl. ¶¶ 10-11, Exs. I, J. In addition, Thompson invited plaintiff to play a significant role in a golf
9 tournament held by Intero, a real estate firm that had an alliance with the Bank, in order to help him
10 establish more contacts. Adame Dep. at 312:14-316:10; Ryan Decl. ¶ 15, Ex. N.

11 On June 6, 2007, Nancy Chambard told Adame to meet with her and Thompson at the Palo Alto
12 sales office. Adame Decl. ¶ 79. Adame claims that he understood the purpose of the meeting was to
13 discuss ways to adapt to the rapidly declining real estate market. *Id.* ¶ 79. He claims that "[n]obody
14 provided any feedback or comments on what I said," and that, on the contrary, Thompson told him to
15 "[k]eep doing what you're doing." *Id.* ¶¶ 83-84. Plaintiff claims that he left the meeting with no
16 knowledge that the Bank's progressive discipline process had been initiated against him.³ *Id.*
17 Thompson, on the other hand, maintains that the June 6, 2007 meeting constituted a verbal warning
18 under Bank of America's progressive discipline guidelines. Adame Decl. ¶ 106.

19 After the meeting, plaintiff claims that he received no coaching or any type of assistance that
20 would indicate that he received a verbal warning. Bank of America disputes this claim and has
21 proffered evidence that subsequent to the June 6 meeting, plaintiff provided Thompson with an "action
22 plan" for his office, to which she responded with comments on June 18, 2007. Thompson Dep. at
23

24 ² Defendant objects to this evidence as hearsay. Although Bender's statement to Adame is
hearsay, plaintiff Bender's own statement about how he felt Thompson treated him is not.

25 ³ The Bank's progressive discipline guidelines provide that in cases in which an employee is
26 not meeting his goals, his manager should first issue a verbal warning, and actively coach him on ways
27 to improve his performance. In the event of non-improvement, the manager should, after consultation
28 with Advice and Counsel, draft a written warning identifying plaintiff's deficiencies and what he must
do to improve. Finally, if the employee still does not improve, the manager should, after consultation
with Advice and Counsel, issue a "final written warning," after which, failure to improve performance
may be punishable by termination. *See* Chambard Dep. at 63:1-69:25; Rhine Dep. at 69:1-72:25.

298:16-200:25; Ryan Decl. ¶ 12, Ex. K. In addition, in July 2007, Thompson counseled plaintiff that he needed to improve his office's BPP, MLO productivity, and second mortgage/HELOC metrics. Pl.'s Dep. at 248:13-250:8; Ryan Decl. ¶ 11, Ex. J.

Adame claims that in June 2007, Thompson also excluded him from the PFUN⁴ program. Thompson describes PFUN as "a system of points that allowed an MLO to lower the interest rate on a mortgage loan to meet a competitive rate without hurting his or her commission up to a certain point." Thompson Decl. ¶ 29. Adame claims that because his office was being forced to reduce its sales of ACORN loans in the predominantly low-income region of San Jose, Thompson's failure to include him in this program unfairly constrained his ability to diversify the San Jose office's portfolio, and that this decision was motivated by racial animus. *Id.* Thompson states that only three of the thirteen offices (Palo Alto, Foster City, and San Francisco) in her region were permitted to participate in the program, and that many Caucasian sales managers were also not selected. She asserts, moreover, that participation in PFUN was actually a disadvantage and "not necessarily a good thing" because the pilot limited PFUN use and was a "bigger hit to the loan officers." Thompson Dep. at 125:2-23; Thompson Decl. ¶ 29.

Adame claims that at an August 2007 sales meeting, Thompson admonished plaintiff Connie Davis, an African American, for soliciting business outside of her territory, and instructed her to "stay in your hood." Adame, Davis, and Bender all discussed this after the meeting, and each regarded it as offensive. Adame Decl. ¶¶ 100-01. At a dinner held after this meeting, Ralph Mariano, the Palo Alto sales manager, expressed to Adame that he knew Adame was not like "those other people," while shifting his gaze to plaintiffs Bender and Davis. He then informed Adame that if Adame fired a minority MLO he had hired, "all would be well with Ann [Thompson]." *Id.* ¶ 103.

On August 24, 2007, Thompson issued a written warning to plaintiff, which specified that Adame was expected to exhibit "immediate and sustained improvement" in HELOC volume, MLO productivity, and BPP sales. Pl.'s Dep. at 339:14-361:18; Ryan Decl. ¶ 17, Ex. B. When Adame expressed his surprise at receiving a written warning because he was unaware that he had received a

⁴ The parties do not define this acronym.

1 verbal warning, Thompson informed him that the June 6, 2007 meeting constituted a verbal warning,
2 and requested that he sign a written acknowledgment to that effect. Adame Decl. ¶ 106. Adame
3 contends that he signed the document under duress, fearing termination for insubordination if he refused.
4 Although the written warning initially mandated a BPP sales rate of 17% and an MLO productivity of
5 70%, Thompson agreed to Adame's request to lower the expected MLO productivity to 50%, and to find
6 merely an "upward trend" in BPP sales sufficient. Adame Decl. ¶ 108; Ryan Decl. Ex. P.

7 On September 19, 2007, less than one month after issuing the initial written warning, Thompson
8 and Chambard went to Adame's office and served him with a final written warning. The final warning
9 mandated that if Adame did not meet his goals by the end of the month, he faced potential termination.
10 According to Adame, this demand was impossible to satisfy, and when he asked Thompson if she was
11 looking to have him out by the end of the month, "[s]he just looked at me and smirked." Adame Decl.
12 ¶ 118. At this point, Chambard suggested Adame would make a good loan officer, and that if he signed
13 the final warning and stepped down as sales manager, they could arrange for his transfer. *Id.* ¶ 120.
14 During the meeting Thompson also stated multiple times that Adame "lacked energy." Adame claims
15 that this is indicative of ageist animus.

16 Adame claims that Thompson improperly applied the Bank's progressive discipline guidelines,
17 and that he was treated more severely than similarly situated Caucasian employees. He asserts that
18 because loans take sixty to ninety days to be approved, it would take at least that long to exhibit
19 improvement after receiving a warning. Adame Decl. ¶¶ 97-100; Thompson Decl. ¶ 14. For this
20 reason, he claims that Thompson's issuance of his final written warning less than 30 days after the initial
21 warning, and the eleven day deadline for improvement contained in the final warning, were patently
22 unreasonable and designed as a pretext to fire him. While defendant claims that Adame's performance
23 did not improve materially between June and September, evidence submitted by both parties indicates
24 that Adame's MLO productivity increased from 46.8 percent to 48.8 percent, and that the proportion
25 of low-income loans sold by his office fell from 23.6 to 23 percent. Thompson Decl., Exs. B, C.
26 However, the percentage of the overall sales goal met by Adame fell from 111.1 percent to 79.7 percent
27 between the second and third quarters. *Id.*

28 Plaintiff claims, and Nancy Chambard has testified, that employees are entitled to at least 30

1 days between disciplinary steps. Chambard Dep. at 65:17-67:12. According to Chambard, sales
2 managers need only show incremental growth over a period of time in order to save their jobs.
3 Chambard Dep. 81:2-85:9. Moreover, although she was present at the June 6, 2007 meeting with
4 plaintiff, when asked, she could not recall if she had ever been present for the issuance of any verbal
5 warning to Adame. Chambard Dep. at 63:7-16. Thompson has also acknowledged the ambiguity of
6 verbal warnings in general. When asked whether an underperforming Caucasian sales manager had
7 been issued a verbal warning when she coached him and asked him to submit an action plan, Thompson
8 replied, acknowledging the similarity to Adame's case, "He was coached verbally. I don't know if it
9 was a verbal warning, but yes, similar document and similar discussions." Thompson Dep. 341:15-20.
10 Diana Rhine of the Bank's Advice and Counsel Department has testified that written warnings generally
11 do not include specific time frames, and that the imposition of an unreasonable goal is improper. Rhine
12 Dep. at 70:6-16; 101:2-107:13. Thompson claims, on the other hand, that the progressive discipline
13 guidelines were intended specifically for MLOs, and that while she generally applied progressive
14 discipline to sales managers (except in extreme cases or for ethics violations), it was nevertheless her
15 prerogative to take whatever action she deemed fit. Thompson Dep. at 44:18-53:6; 63:25-65:18.

16 Plaintiff stepped down from his position as sales manager on October 1, 2007, and was replaced
17 by Craig Stinnett, a forty-three-year old Caucasian male. Adame began working once again for Putris
18 as an MLO at the Bank's Sunnyvale office, and claims that during this period he learned from Putris that
19 Thompson had told his replacement, Stinnett, that "[a] monkey could have run this office better than
20 Richard Adame." Thompson denies that this statement was ever made. Thompson Dep. at 291:24-
21 292:2. Stinnett declares that "does not recall" Thompson making such a statement. Stinnett Decl. ¶ 6.

22 On October 23, 2007, plaintiff filed a complaint with Bank officials claiming, *inter alia*, that
23 Thompson discriminated against him, and requesting to be reinstated as sales manager. Plaintiff's
24 complaint was forwarded to the Advice and Counsel Department, where it was investigated by Diana
25 Rhine. Rhine Dep. at 98:4, 183:2-7, Ex. 18. Rhine interviewed Adame and Thompson, and based on
26 their statements concluded that Adame's claim was unfounded. Rhine did not interview Bender, Davis,
27 Putris, Stinnett, Mariano, or Quinn. Rhine Dep. at 114:24-123:11; 188:4-195:25. Plaintiff alleges that
28 the investigation was inadequate and that Bank of America did not take his claims seriously.

1 Defendant contends that after stepping down as sales manager, plaintiff underperformed as a
2 MLO. However, according to Putris, while plaintiff was working as a MLO, he was “doing pretty
3 good.” Putris Dep. at 166:5-15. In March 2008, plaintiff, who claims he was seeking a “fresh start,”
4 voluntarily stepped down from his MLO position and began working for Nick Mathe as a “reverse
5 mortgage loan officer” (“Reverse MLO”). Adame Dep. at 185:1-187:13. Plaintiff claims that the
6 Bank’s failure to adequately investigate his complaint led to a decline in his performance. *See* Adame
7 Dep. at 201:4-6. In October 2008, Mathe verbally counseled plaintiff for his poor performance as a
8 Reverse MLO. *Id.* at 205:18-208:22. Because plaintiff failed to improve, in November 2008, Mathe
9 issued him a written warning. *Id.* In December 2008, after plaintiff again failed to improve, Mathe
10 issued plaintiff a final written warning, and ultimately gave plaintiff the option to retire rather than face
11 termination. Adame Dep. at 184:16-184:25, 209:24-210:19.

12 Plaintiff claims that he “was forced to resign” because he found “the Bank’s refusal to do
13 anything at all about Ann Thompspon’s blatant, malicious, and hostile discriminatory treatment towards
14 [him] and other minority sales managers . . . extremely disheartening.” Adame Decl. ¶ 133; *see also*
15 Adame Dep. at 209:24-210:19. Plaintiff alleges that the Bank’s failure to dispose of his claim led to his
16 depression, which in turn affected his performance as Reverse MLO, and led to the Bank’s adverse
17 action (retaliation) that forced his retirement.

18 Based on the foregoing, plaintiff Adame has alleged claims for (1) race discrimination in
19 violation of 42 U.S.C. § 1981; (2) violation of Title VII of the Civil Rights Act of 1964 (race
20 discrimination by an employer); (3) violation of the Age Discrimination in Employment Act (“ADEA”),
21 (4) race and age discrimination in violation of the California Fair Employment and Housing Act
22 (“FEHA”) (Cal. Gov’t Code § 12940 *et seq.*); (5) FEHA harassment based on race and age (Cal. Gov’t
23 Code § 12940 *et seq.*); (6) FEHA retaliation (Cal. Gov’t Code § 12940 *et seq.*); (7) wrongful
24 termination/demotion/retaliation in violation of public policy; and (8) defamation. Plaintiff alleges that
25 Thompson alone discriminated against him, and alleges no claims against Putris or Mathe for action
26 taken subsequent to his demotion. Defendant has moved for summary judgment on all of Adame’s
27 claims.
28

LEGAL STANDARD

Summary adjudication is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

In a motion for summary judgment, “[i]f the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.” *See T.W. Elec. Service, Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the non-moving party. *See T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

DISCUSSION**I. Section 1981, FEHA, and Title VII race discrimination claims and FEHA failure to prevent discrimination claim**

Defendant moves for summary judgment on Adame’s race discrimination claims under 42 U.S.C. § 1981, the California Fair Employment and Housing Act (“FEHA”) and Title VII, as well as Adame’s claim for failure to prevent discrimination under FEHA. Since the analyses required for § 1981, Title VII, and FEHA claims are substantially the same, the Court analyzes them concurrently. *See, e.g., Brooks v. City of San Mateo*, 229 F.3d 917, 923 n.3 (9th Cir. 2000); *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 516-17 (1998); *see also Fonseca v. Sysco Food Servs. of Arizona, Inc.*,

1 374 F.3d 840, 850 (9th Cir. 2004). Under the *McDonnell Douglas* burden-shifting framework, to mount
2 a successful Title VII claim, a plaintiff must first establish a *prima facie* case of unlawful discrimination.
3 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The burden then shifts to the
4 employer to proffer a legitimate, nondiscriminatory rationale for its action. *Id.*; *McGinest v. GTE*
5 *Service Corp.*, 360 F.3d 1103, 1122-23 (9th Cir. 2004). If the employer does so, then the plaintiff must
6 show that the nondiscriminatory reason is pretextual in order to prevail. *McGinest*, 360 F.3d at 1122.

7 Although defendant concedes for purpose of this motion that plaintiff makes a *prima facie* case
8 for race discrimination, defendant claims that plaintiff has not met and cannot meet his burden in
9 showing that defendant's legitimate non-discriminatory reason for terminating plaintiff – namely, that
10 “plaintiff was not meeting his goals and that on several of his assigned metrics, his branch was
11 performing at the lowest level in the region” – was pretextual. Def.'s Mot. at 19:2-3. Defendant argues
12 that plaintiff's failure to prevent discrimination claim likewise fails on the ground that defendant cannot
13 show he was subject to racial discrimination.

14 In response, plaintiff contends that he was treated differently from similarly situated non-
15 minority sales managers. Plaintiff has submitted evidence that could support the inference that
16 Thompson applied the progressive discipline policy differently to Adame than she did to similarly
17 situated Caucasian employees. Specifically, Adame testified that he did not know he was being
18 “verbally warned” at the June 6, 2007 meeting, and thus that his job was imperiled. Chambard also
19 testified that despite the fact she was present at the June 6 meeting, she has no recollection of ever being
20 present for the issuance of any verbal warning. Thompson herself likewise acknowledged the ambiguity
21 surrounding the issuance of verbal warnings and testified that a similarly situated Caucasian who
22 received counseling was not verbally warned. Chambard also testified that a record of the issuance of
23 a verbal warning should always be kept. It is undisputed that no contemporaneous record was made to
24 document a verbal warning on June 6, 2007. Instead, it was not until August 24, 2007 that Thompson
25 demanded that Adame sign an acknowledgment that the June 6 meeting constituted his verbal warning.

26 The deposition testimony of Rhine, Chambard, and Putris also suggests that Thompson's
27 imposition of a deadline for plaintiff to meet expectations within fewer than thirty days in a field where
28 it takes sixty to ninety days for such improvement to manifest was potentially both unreasonable and

1 improper. Rhine's testimony likewise suggests that the increase in plaintiff's MLO productivity should
2 have halted the discipline process. Thompson states in her testimony, by contrast, that although some
3 Caucasian sales managers supervised by her had performance issues, they were given ample coaching,
4 and did not receive a written warning. *See* Thompson dep. 203:3-205:4.

5 The Bank asserts that Thompson did in fact follow the progressive guidelines, even though she
6 was not at all obliged to, and that it was entirely her prerogative to specify a time frame in which to meet
7 the goals set at the national level. Thompson, Rhine, and Chambard all state in their testimony that the
8 written warnings should be drafted in consultation with Advice and Counsel (which Thompson claims
9 she did), and that the ultimate disciplinary remedy should be tailored to the circumstance, which the
10 regional executive knows best. Moreover, the Bank argues that the standard to which Thompson was
11 holding Adame was not implemented during her tenure as regional executive, but rather during Putris',
12 against whom Adame does not assert a race discrimination claim. However, the fact that Thompson had
13 discretion to terminate plaintiff according to the method and process of her choice is irrelevant. The
14 dispositive question is whether the process she employed in disciplining Adame differed from the
15 general process employed by the Bank because of his race, and plaintiff's evidence, even if
16 inconclusive, is nevertheless sufficient to support such an inference of discrimination by a reasonable
17 juror at trial.

18 Although summary judgment could be denied on the basis of the foregoing alone, material
19 factual controversies also exist as to other circumstantial evidence. Plaintiff Adame and Bender's
20 testimony that Thompson refused to exchange the same warm social pleasantries (hugging, kissing on
21 the cheek, etc.) with them as their Caucasian counterparts, combined with her alleged deliberate refusal
22 to acknowledge plaintiffs while acknowledging the other (Caucasian) sales managers at meetings
23 conflicts directly with that of Thompson, who counters she treated Adame, Bender, and Davis with the
24 same respect. Finally, Thompson denies ever saying, and Stinnett "does not recall" ever hearing or
25 recounting to Putris, Thompson's alleged statement that a monkey could run the San Jose office better
26 than Adame. This directly contradicts the sworn testimony of both Putris and Adame.⁵ Thus, viewing
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28 ⁵ The Court addresses defendant's hearsay objection *infra*.

1 the evidence in the light most favorable to the plaintiff, the Court finds that these factual discrepancies,
2 could conceivably be resolved in favor of the plaintiff by the trier of fact, thereby permitting the
3 inference that plaintiff's termination/demotion was motivated by racial animus. Accordingly, the Court
4 DENIES defendant's motion for summary judgment as to plaintiff's § 1981, Title VII, and FEHA race
5 discrimination claims. The Court also DENIES defendant's motion for summary judgment as to
6 plaintiff's failure to prevent racial discrimination claim.

7

8 **II. Age discrimination claims**

9 Defendant moves for summary judgment on plaintiff's claims for age discrimination under
10 FEHA and ADEA. In order to make out a *prima facie* claim for age discrimination under these statutes,
11 plaintiff must demonstrate that (1) he is age 40 or older, (2) he was performing his job adequately, (3)
12 he suffered an adverse employment action, and (4) he was replaced by a younger worker or terminated
13 under some other circumstance supporting the inference of an improper, discriminatory motive. *See*
14 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (ADEA); *Guz v. Bechtel Nat'l*
15 *Inc.*, 24 Cal. 4th 317, 353 (Cal. 2000) (FEHA).

16 Plaintiff is fifty-eight years old, claims he performed his job adequately, was given two written
17 warnings by Thompson, and was replaced by Stinnett, a Caucasian male fifteen years his junior. Thus,
18 there is no question that plaintiff has stated a *prima facie* case for age discrimination. Defendant,
19 however, asserts that plaintiff performed his job inadequately, and points to his failure to meet his goals
20 on several metrics as a legitimate reason for his dismissal, thus shifting the burden of proof to plaintiff.
21 Although plaintiff submitted evidence to show that he was treated differently than similarly situated
22 Caucasian employees, the Court finds that he has submitted no evidence that he was treated differently
23 than similarly situated younger employees. In fact, eleven of the Northern California sales managers
24 were over forty, and sales managers older than plaintiff were not terminated, while plaintiff Davis, who
25 is younger than Adame, was. Bush Decl. ¶¶ 3-4. Accordingly, plaintiff fails to show that defendant's
26 proffered legitimate reason for firing him was merely a pretext.

27 The only evidence plaintiff provides in support of his age discrimination claim is his testimony
28 that Thompson told plaintiff on one occasion that he "lacked energy." Pl.'s Dep at 408:18-410:11. But

1 this comment did not refer to plaintiff's age, and there is no evidence to suggest that it was even related
 2 to his age. Rather, as other courts have found, it is more appropriately viewed as an ambiguous and
 3 stray remark insufficient as a matter of law to establish a claim for age discrimination. *See Nidds v.*
 4 *Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1996) (supervisor's comment that he wanted
 5 to get rid of the "old timers" who did not "kiss the ass" of the supervisor did not support an inference
 6 of age discrimination because the comment was ambiguous and "could refer [just] as well [to]
 7 employees who failed to follow directions as to employees over 40."); *Horn v. Cushman & Wakefield*
 8 *Western, Inc.*, 72 Cal. App. 4th 803, 810 (Cal. Ct. App. 1999) (holding that isolated comment "this is
 9 1994, haven't you ever heard of a fax before" was "highly ambiguous" and "at most a 'stray' ageist
 10 remark . . . entitled to virtually no weight in considering whether the firing was pretextual").
 11 Accordingly, the Court finds that plaintiff has failed to raise a triable issue of fact regarding whether
 12 plaintiff's termination was impermissibly motivated by age discrimination, and therefore GRANTS
 13 summary judgment in favor of defendant as to this claim.

14 15 **III. FEHA retaliation claim**

16 Plaintiff alleges that Thompson retaliated against him in violation of FEHA, arguing that by
 17 demoting him and treating his race/age discrimination complaint against Thomson dismissively, the
 18 Bank was responsible for the onset of his depression and the subsequent adverse action that was taken
 19 against him for his resulting poor performance as a Reverse MLO under Mathe. Compl. ¶¶ 84-86. To
 20 establish a *prima facie* case for retaliation, a plaintiff must show (1) he engaged in a protected activity;
 21 (2) that his employer subjected him to an adverse action which materially affected the condition of his
 22 employment; and (3) that there is a causal link between the protected activity and the employer's
 23 adverse action against plaintiff. *See Morgan v. Regents of the Univ. of California*, 88 Cal. App. 4th 52,
 24 69 (Cal. Ct. App. 2000). "The causal link may be established by an inference derived from
 25 circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected
 26 activities and the proximity in time between the protected action and allegedly retaliatory employment
 27 decision.'" *Id.* (quoting *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988)).

28 Defendant contends that Adame fails to make a *prima facie* case for retaliation. The Court

1 agrees. Plaintiff did not submit his letter of complaint regarding Thompson's alleged wrongful
2 demotion of him until October 23, 2007, almost a month after stepping down from his position as the
3 San Jose office's sales manager. Plaintiff thus did not engage in a protected activity until after suffering
4 an adverse employment action from Thompson. As a matter of simple logic, plaintiff cannot claim that
5 the Bank retaliated against him for engaging in a protected activity which did not occur until after the
6 adverse action.

7 Although plaintiff is not entirely clear in his opposition, he also seems to claim that the Bank's
8 adverse action against him was its forcing him to resign as a result of its failure to adequately investigate
9 his discrimination claim. He argues that the dismissal of the investigation caused his depression, which
10 precipitated his subsequently poor job performance, which in turn provided grounds for his alleged
11 forced resignation as a Reverse MLO. Even accepting this as true, the connection between plaintiff's
12 filing of his complaint and his ultimate resignation is too attenuated to constitute a causal link. Almost
13 one year transpired between plaintiff's lodging of his complaint with the Bank in October 2007 and his
14 verbal warning from Mathe in October 2008, and he thus cannot point to any close temporal connection
15 supportive of the inference of retaliation. *See Morgan*, 88 Cal. App. 4th at 69. Moreover, plaintiff
16 alleges no wrongful conduct on the part of Putris or Mathe, and acknowledges that Thompson played
17 no role in the Mathe's progressive disciplinary action against him. Pl.'s Dep. 182:23-184:15.;
18 Thompson Decl. ¶¶ 38-39. Plaintiff thus acknowledges that Mathe legitimately applied the progressive
19 discipline guidelines to him for his failure to meet his sales goals. As a result, he cannot say that his
20 departure was in any way precipitated by Bank of America's response to his complaint against
21 Thompson. Accordingly, the Court GRANTS defendant's motion for summary judgment as to
22 plaintiff's FEHA retaliation claim.

23 24 **IV. FEHA harassment claim**

25 Plaintiff alleges a cause of action for harassment and failure to prevent harassment under FEHA
26 with respect to both his age and race. Compl. ¶¶ 75-81. Defendant, however, contends that plaintiff
27 cannot make a *prima facie* case for harassment, and has accordingly moved for summary judgment. To
28 establish a valid harassment claim, a plaintiff must show that his employer subjected him to wrongful

1 treatment “severe enough or sufficiently pervasive to alter the conditions of employment and create a
2 work environment that qualifies as hostile or abusive,” and that the conduct was directed at him because
3 of his age or race. *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 279 (Cal. 2006). In order
4 to qualify as pervasive, the conduct complained of must extend beyond just a few isolated incidents.
5 *Hughes v. Pair*, 46 Cal. 4th 1035, 1048 (Cal. 2009).

6 Here, plaintiff’s evidence of harassment consists of a handful of comments and actions made and
7 taken by Thompson: (1) her alleged negative discussion of plaintiff’s performance in April 2007, prior
8 to becoming his manager; (2) her decision to exclude plaintiff’s office from the pilot PFUN program;
9 (3) her allegedly racially offensive admonishment to plaintiff Davis that she “stay in [her] hood;” and
10 (4) Thompson’s delivery of plaintiff’s initial and final written warnings in August and September 2007,
11 respectively. To establish a hostile work environment, plaintiff must submit evidence of a “concerted
12 pattern of harassment of a repeated, routine and generalized nature.” *Aguilar v. Avis Rent A Car System*,
13 21 Cal. 4th 121, 131 (Cal.1999). Two written counselings threatening termination in the event of failure
14 to improve job performance, the exclusion from a program which only three of fourteen offices in the
15 region were chosen to participate in, a single incident of not shaking his hand, and making a racially
16 insensitive remark to someone other than him, fail to establish such a pattern. Rather, these incidents
17 are both sporadic and isolated. For this reason, the Court GRANTS summary judgment as to plaintiff’s
18 harassment and failure to prevent harassment claims.

19
20 **V. Defamation**

21 Plaintiff alleges that defendant defamed him after he stepped down to become a MLO, when
22 Thompson allegedly told Stinnett that “[a] monkey could run the [San Jose] office better than
23 [plaintiff].” Adame Dep. at 135:16-136:15, 441:4-442:17. Plaintiff claims to have learned of this
24 statement from Putris, who has testified that he learned of it from Stinnett. However, Thompson denies
25 making the statement, and Stinnett “does not recall” hearing or repeating it, and the Bank accordingly
26 moves for summary judgment on the grounds that the comment is inadmissible hearsay. In the
27 alternative, even accepting the evidence as admissible, defendant argues that the comment was
28 privileged.

Defamation constitutes “an injury to reputation; the injury may occur by means of libel or slander.” *Shively v. Bozanich*, 31 Cal. 4th 1230, 1232 (Cal. 2003). As this claim does not involve a written communication, libel is not alleged here. *See* Cal. Civ. Code § 45. The Court therefore analyzes Thompson’s alleged statement as slander. Slander is defined as a false and unprivileged oral communication/publication that tends “directly to injure [the defamed] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits.” Cal. Civ. Code § 46(3); *see also Shively*, 31 Cal. 4th at 1232. To qualify as a “publication,” the defendant need not have made the statement to any minimum number of individuals; rather, it is sufficient that the defamatory statement is imparted to a single person other than the plaintiff. *Lundquist v. Reusser*, 7 Cal. 4th 1193, 1203 (Cal. 1994).

On its face, Thompson’s comparison of plaintiff to a monkey, if actually made, is defamation per se. *See Mercado v. Hoefler*, 190 Cal. App. 2d 12, 16 (Cal. Ct. App. 1961) (language may be defamatory on its face even though susceptible of an innocent interpretation). Such a statement is both unquestionably demeaning and imputes to him a general professional disqualification well beyond any justifiable bounds. Moreover, although the statement was made to only two people (Stinnett, then Putris) before reaching plaintiff, that is itself sufficient to constitute a publication. Thus, unless the statement is found to be either inadmissible hearsay or privileged, summary judgment at this stage would be inappropriate.

A. Hearsay

Defendant contends that Adame and Putris’ testimony regarding Thompson’s allegedly defamatory statement to Stinnett is inadmissible hearsay. Defendant argues that plaintiff submitted Putris’ testimony as to Stinnett’s alleged out of court statement to prove the truth of the assertion that Thompson compared Adame to a monkey. However, neither plaintiff nor defendant has addressed whether Putris’ testimony is taken out of the hearsay rule because it is the statement of a party-opponent. *See* Fed. R. Evid. 801(d)(2)(D) (a statement is not hearsay if it is “made by the [litigation] party’s agent

1 or servant concerning a matter within the scope of the agency or employment . . .”).

2 Putris was a Regional Executive of the Bank, and Stinnett was a Sales Manager. The case law
3 suggests that if Stinnett and Putris had sufficient authority as defendant’s agents to speak on its behalf,
4 then the party-opponent exception applies to Putris’ testimony. *See, e.g., Coburn v. PN II, Inc.*, No.
5 09-15837, 2010 WL 1258124, at *3 n.3 (9th Cir. Mar. 10, 2010); *Brewer v. Kmart Corp.*, 5:08-cv-1914,
6 2010 WL 2346366, at *4 n.5 (C.D. Cal. June 7, 2010). In *Coburn*, the Ninth Circuit considered whether
7 the party-opponent exception could apply to the plaintiff’s evidence that the defendant company’s
8 executive made a discriminatory comment about her to a vice president, who in turn recounted the
9 statement to plaintiff’s supervisor, who then informed plaintiff. The Ninth Circuit found that had the
10 plaintiff submitted the sworn testimony of her supervisor stating that the vice president informed the
11 plaintiff’s supervisor of the discriminatory statement, the party-opponent exception would have applied
12 because the vice-president had the authority to make admissions on behalf of the defendant company.
13 *Coburn*, 2010 WL 1258124, at *3 n.3. In *Brewer*, the Court found the party-opponent exception applied
14 to a plaintiff’s statement that her Store Manager had told her the Regional Manager had knowledge of
15 plaintiff’s protected activity, because the Store Manager was “clearly an agent of defendant Kmart.”
16 *Brewer*, 2010 WL 2346366, at *4 n.5.

17 On this record, the Court cannot conclude that the testimony at issue is hearsay. The Court
18 **OVERRULES** defendant’s objection without prejudice to renewal if, at trial, defendant can demonstrate
19 that the party-opponent exception does not apply.

20
21 **B. Privilege**

22 Defendant also argues that plaintiff’s defamation claim fails because Thompson’s statement was
23 privileged. In the context of this case, a privileged communication is one made “without malice, to a
24 person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation
25 to the person interested as to afford a reasonable ground for supposing the motive for the communication
26 to be innocent, or (3) who is requested by the person interested to give the information.” Cal. Civ. Code
27 § 47(c). Defendant cites *Lee v. Eden Medical Center*, 690 F. Supp. 2d 1011, 1022-23 (N.D. Cal. 2010),
28 for the proposition that an employer’s statements to employees who have a work-related interest in

1 knowing the reason for the allegedly defamed individual's termination are privileged. In that case, the
2 court found that a hospital human resources manager was privileged to tell hospital management and
3 counsel that a nurse it formally employed was mentally unbalanced and unfit to be a nurse. *Id.*
4 Defendant argues that the instant case is no different and asserts that because Stinnett was Adame's
5 replacement, he was an "interested party" under § 47(c), and thus any communication regarding
6 Adame's previous management was both innocent and privileged.

7 However, Adame's case is distinguishable because a statement cannot be deemed privileged if
8 plaintiff can show the statement was made maliciously. *Lundquist*, 7 Cal. 4th at 1212. The Court finds
9 that plaintiff has presented sufficient evidence to raise a triable issue of fact as to whether Thompson
10 acted with malice. As Putris' testimony suggests, Stinnett recounted Thompson's statement to him as
11 though "he couldn't believe she said it to him" and as though "he was shocked." Putris Dep. at 175:20-
12 176:24. Based on this evidence, a jury could reasonably resolve the discrepancy in the plaintiff's favor,
13 and find that (1) Thompson made the statement, (2) that Stinnett had no reason for supposing
14 Thompson's motive to be innocent, and thus (3) that the statement was not privileged. For this reason,
15 the Court DENIES defendant's motion for summary judgment as to plaintiff's defamation claim.

17 CONCLUSION

18 For the foregoing reasons, defendant's motion for summary judgment is GRANTED in part and
19 DENIED in part. (Docket No. 66).

21 **IT IS SO ORDERED.**

23 Dated: August 5, 2010

22 
24 SUSAN ILLSTON
United States District Judge